No. 82-1003

IN THE

Supreme Court Of The United States

October Term, 1982

PHYLLIS C. SWANGER, Executrix of the Estate of Carl Swanger, Jr., Deceased - Petitioner

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK - - - Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The sole question presented in this diversity of citizenship case is whether the District Court and the United States Court of Appeals were correct in sustaining a Summary Judgment for an insurer holding that no life insurance coverage was in force where no conditional receipt existed and the applicant for $150,000 term group insurance failed to submit to a required medical examination and failed to furnish the insurer with specifically required evidence of insurability before his death in an automobile accident.

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v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Certiorari should be *denied* because the decision and opinion of the United States District Court, affirmed from the bench and adopted by the United States Court of Appeals for the Sixth Circuit, are correct, conform to the law of Kentucky and do not conflict with any general principals of jurisprudence nor have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Petitioner has raised *no* question of the character indicated in Rule 17 of the Rules of the Supreme Court of the United States (adopted April 14, 1980).

COUNTER-STATEMENT OF THE CASE

The Petitioner is the Executrix of Carl Swanger, Jr. ("Mr. Swanger"), a 39 year old practicing lawyer and member of the Association of Trial Lawyers of America ("ATLA").

a. The Group Policy and Brochure.

On September 1, 1975 the Respondent, The Mutual Life Insurance Company of New York ("MONY"), issued its Group Term Life Insurance policy No. G-9978 ("Group Policy") to the Trustees of a Group Insurance Trust ("ATLA Trust") maintained by ATLA.

On May 23, 1978 ATLA solicited its members by mail for applications for coverage under the Group Policy in various amounts from $10,000 to a maximum of $150,000, of which, during an open enrollment period, $10,000 was guaranted to be issued regardless of the applicant's health.

The solicitation consisted of a form letter on the letterhead of ATLA to its members designating Daniels-Head & Associates, Inc. ["Daniels-Head"], an independent insurance agency specializing in administering professional association insurance programs, as Plan Administrator for the ATLA Trust, and a solicitation brochure ["Brochure"].

The Brochure stated in part:

> EFFECTIVE DATE OF INSURANCE
>
> *All coverage is subject to approval by MONY.* If your application is approved without further re-

quirements, your insurance will become effective as of the date your application and premium were received by the Plan Administrator. *If you are required to furnish any additional evidence of insurability* over your own signature *(which may include a medical examination at MONY's expense), your coverage, if approved, will become effective as of the date you furnish final evidence of insurability satisfactory to MONY* (emphasis added) [App. 69].

The Brochure also provided:

"HOW TO APPLY

* * *

2. Detach and mail your application and check for the first premium (made payable to the ATLA Group Insurance Trust) to:

ATLA Group Insurance Trust
P.O. Box 650
Portsmouth, Ohio 45662

Daniels-Head was authorized by MONY to solicit applications from ATLA members through the form letter and Brochure and to collect semi-annual premiums *from the ATLA Trust.* Daniels-Head was *not* authorized by MONY to, had no right to and *did not* underwrite risks, *i.e.,* accept or reject on behalf of MONY any applications for coverage from ATLA members.

b. Mr. Swanger's Application to MONY.

On June 2, 1978 Mr. Swanger executed an application for $150,000 group term life insurance under the

Group Policy. The application provided the following above Mr. Swanger's signature:

> It is mutually agreed that [a] benefits shall only become effective in such amounts and as of such dates as are unconditionally approved and specified by Mutual of New York; [b] only an Executive Officer of Mutual of New York may accept information not contained in this application, modify any contract or waive any requirement for coverage.

As directed by the Brochure, Mr. Swanger mailed the application to the ATLA Group Insurance Trust and enclosed his check for $165 correctly made payable to the "ATLA Group Insurance Trust."

On June 6, 1978 Daniels-Head received Mr. Swanger's application and check, endorsed the check "For Deposit Only, ATLA Group Insurance Trust, 01-245-9" and deposited it in a special account maintained by the ATLA Trust in a Portsmouth, Ohio bank bearing Number 01-245-9 and designated "ATLA Group Insurance Trust."

Mr. Swanger received a June 12, 1978 acknowledgement from Daniels-Head which stated:

> Your application has been received and forwarded to the Insurance Company. If applicable, any deposit which has been submitted by you has been placed in a special account pending the review and/or approval of the Company.

On June 27, 1978 MONY wrote Mr. Swanger that it had his application for insurance coverage and

that it required him to take a medical examination at MONY's expense and enclosed forms and instructions for the medical examination. *Mr. Swanger received this letter.* At the same time MONY advised Daniels-Head that it had requested a medical examination from Mr. Swanger and had approved his coverage under the $10,000 Guaranteed Life Policy Regardless of Health.

Mr. Swanger did *not* submit to and *never* had the required medical examination and never furnished MONY with the required additional evidence of his insurability. On July 4, 1978 Mr. Swanger was killed in an automobile accident.

In October, 1978 MONY forwarded to the Petitioner, Mrs. Swanger, its check for $10,150, representing payment of the $10,000 Guaranteed Life Policy coverage and a return of $150 as that part of Mr. Swanger's $165 premium contribution to the ATLA Trust attributable to the additional $140,000 coverage which had never come into effect and thereafter Daniels-Head forwarded a $165 check to MONY drawn on the ATLA Trust's account.

The Petitioner filed suit in the Circuit Court of Lee County, Kentucky, for the full $150,000 insurance and MONY removed the action to the United States District Court for the Eastern District of Kentucky on the ground of diversity of citizenship under 28 U.S.C. Section 1332.

Following discovery both parties moved for summary judgment.

c. The Opinion of the District Court was Affirmed Verbatim by the United States Court of Appeals for the Sixth Circuit.

The District Court entered a summary judgment for MONY[1] finding the essential facts were undisputed and that Mr. Swanger's application for the additional $140,000 insurance in excess of the $10,000 Guaranteed Life coverage had never been accepted by MONY. The core of the opinion and decision by the District Court and the United States Court of Appeals is that Mr. Swanger never furnished MONY with the required medical proof of insurability and that

> "As previously noted, it is undisputed that Mr. Swanger was notified that his premium payments were 'placed in a special account pending the review and/or approval of the Company.' Had Mr. Swanger been of the opinion that payment of premium and an application for coverage were adequate to effectuate the contract, the above indicated notice and the subsequent request for a medical examination were sufficient to have disabused him of that belief. Accordingly, the Court is of the opinion that the contract for $140,000 insurance coverage was not in force.
>
> As to plaintiff's second contention that there was a contract of temporary or preliminary insurance, the Court is of the opinion that it is also without merit.

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[1]Technically the judgment was for $10,150 in favor of Mrs. Swanger representing the $10,000 Guaranteed Life coverage and $150 return of premium (on the $140,000 application) which MONY had previously tendered to Mrs. Swanger and which had been rejected by her.

The plaintiff cites to the case of *Investors Syndicate Life Insurance Co.* v. *Slayton,* Ky., 429 S. W. 2d 368 (1968) in which the Court of Appeals found that in Kentucky 'conditional receipts' are valid contractual provisions which create a contract of preliminary insurance with the reserved right in the insurer to determine in good faith the applicant's insurability. The plaintiff's have attempted to equate the portion of the brochure discussing an effective date with a conditional receipt.

An application for life insurance is an offer to purchase a policy and the insurer must accept befor a contract exists. Of course, during the time the offer is outstanding and unaccepted, the applicant may revoke his offer. Insurers attempt to discourage or prevent the revocation of offers by use of conditional receipts or 'binders' that give the insurer the option of ultimately accepting or rejecting the offer while making the offer irrevocable by conditionally accepting it. The binders, as in *Investors Syndicate Life Insurance Co.* case, *supra,* typically promise insurance to begin on the date of application or receipt with a caveat that the insurance may be denied upon review of the applicant's insurability. In this case there is no indication that any insurance beyond the guaranteed $10,000.00 will be approved; rather the remaining $140,000 coverage is contingent upon MONY's acceptance. Clearly, MONY did not accept the offer to purchase insurance as acceptance was made contingent upon completion and return of the medical forms."

[Appendix, pp. 26-27, Petitioner's Brief].

The United States Court of Appeals *affirmed the* District Court's judgment upon the opinion of the District Court [Appendix, p. 19] and on September 16, 1982 denied Mrs. Swanger's petition for rehearing, concluding that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of the case. [Appendix, p. 29].

SUMMARY OF ARGUMENT

The District Court and the United States Court of Appeals on undisputed facts correctly held as a matter of law that no temporary or preliminary insurance was in effect on Mr. Swanger's life and that as he failed to furnish MONY with required evidence of insurability and to submit to a medical examination as required by MONY his application for $140,000 additional insurance was never accepted by MONY and no such insurance was in effect at the time of his death.

As the courts below correctly applied Kentucky law in this diversity of citizenship case there are no special and important reasons for granting a review on Writ of Certiorari.

ARGUMENT

FIRST POINT

a. No Special and Important Reasons Exist for Granting a Review on Writ of Certiorari.

The judgment of the District Court, summarily affirmed by the United States Court of Appeals for the Sixth Circuit, involved solely a question under

Kentucky law of (a) whether $140,000 of group life insurance [in addition to the $10,000 Guaranteed Life Policy Regardless of Health previously approved by MONY and not in issue in this action] was in force at Mr. Swanger's death *even though* Mr. Swanger was required by MONY to furnish MONY with evidence of his insurability prior to MONY acting on his application and Mr. Swanger failed to do so before his death and (b) whether the language in the Brochure created a contract of preliminary or temporary insurance *even though no* "conditional" or "binding" receipt was ever issued by MONY.

The decision of the United States Court of Appeals that the $140,000 was *not* in force at Mr. Swanger's death did *not* conflict with the decision of another United States Court of Appeals on the same matter; did *not* decide any question of Federal law; did *not* decide a Federal question in conflict with a state court of last resort; did *not* decide an important question of state law in conflict with applicable state law; did *not* involve any of the other reasons indicated by Rule 17 of the Rules of the Supreme Court of the United States; did *not* depart from any accepted course of judicial proceeding *and* the question it decided was *not* one of great public or private importance.

b. Only Under Extreme, Exceptional and Extraordinary Circumstances Will Certiorari be Granted to Review a Claim That a United States Court of Appeals Misapplied State Law in a Diversity of Citizenship Case.

Both under former Rule 16 and present Supreme Court Rule 17 the Petitioner must show the most ex-

treme, exceptional and extraordinary circumstances to justify the Supreme Court granting certiorari to review a claim that a United States Court of Appeals has so misapplied state law in a diversity of citizenship case as to call for this Court's power of supervision. *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944); *Stoner* v. *New York Life Insurance Co.,* 311 U. S. 464 (1940); *Fidelity Union Trust Co., Executors* v. *Field,* 311 U. S. 169 (1940) and under S.C. 17 *Cuyler* v. *Adams,* 449 U. S. 433 (1981).

The Petitioner has *not* cited any authority under which the Supreme Court has granted certiorari to review a bare claim of misapplication of state law by a federal court in a diversity of citizenship action in the absence of extreme and extraordinary circumstances.

No such circumstances exist in the present case.

SECOND POINT

a. The Facts Are Undisputed.

It is undisputed that MONY approved, and notified Daniels-Head that it had approved, Mr. Swanger's application for $10,000 coverage guaranteed regardless of health, and after Mr. Swanger's death MONY tendered its check for $10,000 and a partial return of premiums to Mrs. Swanger. Mrs. Swanger rejected the tendered check.

The facts are also undisputed that

(1) MONY *never* issued a "conditional receipt" to Mr. Swanger in any form;

(2) On Mr. Swanger's Application for an additional $140,000 of group life insurance MONY *required* Mr. Swanger to furnish it with additional evidence of his insurability and to take a medical examination and so informed Mr. Swanger;

(3) Mr. Swanger *never* took the medical examination and never furnished MONY with the required additional evidence of his insurability;

(4) MONY *never* accepted Mr. Swanger's Application for $140,000 excess insurance (as it had not been furnished with the required evidence of insurability); *never* assumed any risk beyond the $10,000 guaranteed insurance; and *never* issued any policy or insurance for $140,000 on Mr. Swanger's life.

b. The District Court and the United States Court of Appeals Found there was No Contract of Temporary or Preliminary Insurance Equivalent to a Conditional Receipt.

The District Court and the Court of Appeals correctly applied Kentucky law, as it was required to do under *Erie R.R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), and specifically considered the only applicable decision of the Court of Appeals of Kentucky cited by the Petitioner, *Investors Syndicate Life Ins. & Ann. Co.* v. *Slayton,* Ky., 429 S. W. 2d 368 (1968), in which the Court of Appeals held that in Kentucky "conditional receipts" were valid contractual provisions. MONY agrees that a "conditional receipt" is a valid contractual obligation in Kentucky. However, *Investors Syndicate Life* is wholly inapplicable as a *specific binder* or *actual* "conditional receipt" was in fact issued to

Mr. Slayton and all the Court of Appeals did was to hold that such a 'conditional receipt" was valid in Kentucky. There is no Kentucky case holding or even implying that an effective date provision in a solicitation or in a life insurance policy creates temporary or preliminary insurance or constitutes a conditional receipt. The District Court and the United States Court of Appeals had no dispute with *Investors Syndicate Life* and cite it favorably in their opinion, p. 7, *supra,* to support their decision, but found that *as no binder or conditional receipt* was ever issued by MONY the Petitioner's attempt to turn the language relating to the effective date of insurance into a contract of temporary or preliminary insurance or a conditional receipt was without merit. The District Court and the United States Court of Appeals *also held* that the language of the Brochure contained *no indication* that any insurance beyond the guaranteed $10,000 would be approved by MONY without Mr. Swanger complying with the requirements of MONY for additional evidence of insurability and a medical examination. As a result the Petitioner's argument and citation of "conditional receipt" cases[2] from Arkansas, Pennsylvania, California, Kansas, Indiana, and a United States

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[2]*Puritan Life Insurance Company* v. *Guess,* Alaska, 598 P. 2d 900 (1979); *Collister* v. *Nationwide Life Insurance Company,* Pa. 388 A. 2d 1346 (1978); *Smith* v. *Westland Life Insurance Company,* Cal. 539 P. 2d 433 (1975); *Tripp* v. *Reliable Life Insurance Company,* Kan. 499 P. 2d 1155 (1972); *Kaiser* v. *National Farmers Union Life Insurance Company,* Ind. 339 N. E. 2d 599 (1976); *Meding* v. *Prudential Insurance Company of America,* 444 Supp. 634 (N.D. Ind. 1978)

District Court in Indiana are totally inapplicable and have no bearing on the present case which holds that *no* "conditional receipt," either actual or by implication, exists under the facts of this case.

c. MONY Never Accepted Mr. Swanger's Application for $140,000 Additional Insurance as he Failed to Furnish the Additional Evidence of Insurability Required by MONY and Failed to Submit to the Required Medical Examination.

The law in Kentucky and elsewhere is that an application for life insurance is simply an offer to contract which must be acepted before a contract exists. *Rohde* v. *Massachusetts Mutual Life Ins. Co.,* 632 F. 2d 667, 668 (6th Cir. 1980). As MONY required further evidence of insurability, including a medical examination at MONY's expense, the $140,000 coverage could only become effective as of the date the required evidence of insurability was furnished to MONY. The language in the Brochure and MONY's letter to Mr. Swanger were completely clear and unambiguous that Mr. Swanger must furnish the additional evidence of insurability and submit to a medical examination before MONY could act on his application. The law in Kentucky does not permit any tortious construction of language which is susceptible to only one reasonable meaning. *Reynolds Metals Co.* v. *Insurance Co. of State of PA,* 41 F. Sup. 129, 132 (W.D. Ky. 1941); *Maddox* v. *Mutual Life Ins. Co.,* 193 Ky. 38, 234 S.W. 949, 953 (1921).

As Mr. Swanger failed to comply with the requirement of furnishing additional evidence of insurability to MONY and of taking the required medical examina-

tion, MONY never accepted his offer to purchase the additional insurance, which was contingent upon completion and return of the medical forms; his application was not accepted by MONY; and no contract for $140,000 additional insurance coverage was in force at the time of his death.

CONCLUSION

The issues decided on summary judgment by the District Court and affirmed by the Court of Appeals include none of the considerations governing review on certiorari of the character indicated in Rule 17 and are straight forward questions of life insurance law, correctly decided by the Court of Appeals in conformity with the law of Kentucky.

The Petition for Writ of Certiorari should be *denied.*

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